



STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

www.bpu.state.nj.us

IN THE MATTER OF THE JOINT)
PETITION OF SBC COMMUNICATIONS INC.)
AND AT&T CORP, TOGETHER WITH)
ITS CERTIFICATED SUBSIDIARIES FOR)
APPROVAL OF MERGER

TELECOMMUNICATIONS

PROVISIONAL ORDER ON
EMERGENT MOTION
FOR A PROTECTIVE
ORDER

BPU DOCKET NO. TM05020168

(SERVICE LIST ATTACHED)

BEFORE COMMISSIONER FREDERICK F. BUTLER:

The New Jersey Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:2-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all public utility systems which operate within the State of New Jersey, including telephone companies such as AT&T Communications NJ, L.P. ("AT&T"). Moreover, the Board has specifically been granted the authority to review certain mergers and acquisitions by and of such public utilities, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10. Pursuant to said authority, the within matter was initially opened to the Board upon the joint filing of a request by AT&T, together with its certified subsidiaries, and SBC Communications Inc. ("SBC", jointly "petitioners") for Board approval of their proposed merger. In connection with this matter the Board issued a Prehearing Order on April 20, 2005, which set forth a schedule for, *inter alia*, discovery, motions to intervene, and public and evidentiary hearings.

In connection with this matter, the parties executed an Agreement of Non-Disclosure of Information Claimed to be Confidential ("Agreement") which generally protects the confidentiality of certain information provided in discovery. The Agreement provides that

[i]n the event that any Party seeks to use the Information Claimed to be Confidential in the course of any hearings or as part of the

record of these proceedings, the Parties shall seek a determination by the trier of fact as to whether the portion of the record containing the Information Claimed to be Confidential should be placed under seal. (Agreement ¶15)

On June 8, 2005, petitioners filed an emergent motion for a protective order covering information they have deemed confidential. This information is comprised of specific portions of petitioners' prefiled testimony, its interrogatory responses and other documents. According to petitioners, these materials include data related to the number customers served, line counts, customer usage, revenues, services provided, customer location or geographic area served and customer identification; business and strategic plans and market analyses; network and infrastructure information; market, product, pricing or cost plans, strategies or materials; financial materials and analyses, including strategic planning, balance sheets and merger synergy data; employee counts, separation and benefit information; and internal company operations and practices (specific documents or excerpts therefrom alleged to be confidential are set forth in petitioners' Exhibit 1 attached to their motion).

Petitioners certify that public disclosure of said information would cause petitioners serious competitive harm by allowing competitors to identify and target certain customer segments or business lines, as well as learn petitioners' economic and competitive strengths and weaknesses. This, according to petitioners, would afford their competitors distinct advantages and cost savings, while undercutting petitioners' position and increasing their costs. Petitioners also state that public disclosure of the location of various parts of its communications network poses and high security risk.

Petitioners also certify that they have consistently protected the aforementioned information from public disclosure by restricting access thereto, and by seeking and obtaining protective orders from the Federal Communications Commission in connection with that agency's review of the proposed merger.

The Division of the Ratepayer Advocate ("RPA") filed written opposition to petitioners' motion on procedural grounds. Specifically, the RPA contends that the motion, addressed to the Acting Board Secretary, should have been addressed to the "Head of the Agency" pursuant to N.J.A.C. 1:1-12.6(b), with opposing parties given ample opportunity to respond pursuant to N.J.A.C. 1:1-12.6(d). The RPA does not put forth any objection on substantive grounds.

Board Staff has taken no position on the petitioners' pending motion.

DISCUSSION

Pursuant to N.J.A.C. 1:1-12.4(a), motions filed in administrative proceedings shall be supported by affidavits for facts relied upon which are not in the record or which are not subject to official notice. A Board order must be supported by evidence before the Board. N.J.S.A. 48:2-46.

The Open Public Records Act “(OPRA)”, N.J.S.A. 47:1A-1 et seq. lists information which shall not be included in the definition of a government record and shall be deemed confidential, including trade secrets, proprietary, commercial or financial information which, if disclosed, would give an advantage to competitors, and security information for a building or facility which, if disclosed, could jeopardize the security of the infrastructure or persons therein.

As part of the new, post-OPRA procedures established by the Board concerning the public's access to its records and for claimants asserting confidentiality claims, the Board authorized its custodian of records to determine whether information requested by the public is a government record within the meaning of OPRA, or is confidential pursuant to N.J.A.C. 14:1-12.6. Additionally, the Board reserved its authority to make a confidentiality determination when appropriate:

Nothing herein shall limit the Board's authority to make a confidentiality determination within the context of a hearing or other proceeding or with regard to any other matter, as the Board may deem appropriate. [N.J.A.C. 14:1-12.6(d)]

Accordingly, the Board may make confidentiality determinations regarding information gathered in proceedings such as the within matter. Indeed, Paragraph 5 of the Agreement appears to expressly contemplate the issuance of such a protective order, at least in some circumstances, once the information is used in the hearing or submitted into the record. Petitioners have made a convincing showing that the information they have deemed confidential (as specifically set forth in Exhibit A attached to their motion) is indeed of a highly sensitive nature and worthy of protection. This is due to the competitive advantage its disclosure would create for the benefit of petitioners' (especially AT&T's) competitors, and the corresponding disadvantage to petitioners that would result. Petitioners have detailed how a competing carrier could use granular market data to target its own marketing efforts and undercut petitioners. Moreover, the exact location of petitioners' facilities and infrastructure, to the extent not otherwise available to the public, could potentially jeopardize the security of such facilities and the security of those individuals working at or using those facilities.

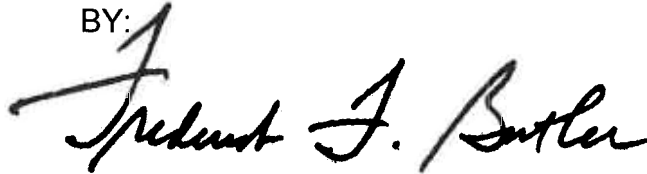
The RPA does not dispute the factual sufficiency of petitioners' showing. Rather, it challenges the filing on procedural grounds. However, such objections are groundless. N.J.A.C. 14:1-1-12.6(b) does indeed require an emergent motion to be filed with an “Agency Head,” but this requirement is clearly meant to contrast with and prohibit the filing of a motion with Office of Administrative Law. N.J.A.C. 14:1-1-12.6(b). In this instance the “Head of the Agency” is the Board itself, and petitioners filed their papers with the Board via its Secretary, which conforms with long established and universally adhered-to Board practice. See N.J.S.A. 48:2-4. Nor does the timing of the motion result in unfair prejudice to any party, since all parties have taken advantage of the available time to express any position with respect to petitioners' filing. Thus, there is no procedural defect therein.

Accordingly, upon careful review of the positions of the parties, I HEREBY FIND that petitioners have made a sufficient showing justifying the granting of their motion for a protective order, and said motion is HEREBY GRANTED.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 6-29-05

BY:

A handwritten signature in black ink, appearing to read "Frederick F. Butler". The signature is written in a cursive, flowing style with a large initial "F".

FREDERICK F. BUTLER
COMMISSIONER

AT&T/SBC MERGER SERVICE LIST

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